

THE HOUSE TRUST

By Eric Scheske

I'm sure every estate planner has dealt with this situation: A widow comes to your office for estate planning. She has a \$70,000 house, two CDs worth a total of \$25,000 and a small checking account. That's it.

And she wants to avoid probate.

Previously, I told this client that her assets didn't merit the cost of a trust (in my office, about three times more than the cost of a simple will) and its complex hassles. I also warned her of the pitfalls of jointly-held assets. I would then tell her that probate isn't a horror any more and that the proceedings, if they go smoothly, wouldn't be terribly costly or lengthy.

After getting this advice, she would usually choose the will, but still be somewhat disappointed that her children would have to deal with probate.

I think I've found a simple and effective way around that problem.

I call it a house trust. This type of trust holds my less-wealthy client's residential real estate until she dies, then transfers the house or sale proceeds to her heirs. The house trust expressly states that it can hold no other assets. This reduces the possibility that the settlor or someone else could add assets to the trust that it can't handle because of its limited nature (I tell my client, in writing, that the trust is fragile and will break if she adds too much to it).

Combined with a few "transfer on death" designations for her handful of

investments, the house trust allows the widow to escape probate, except possibly for personal property and the stray titled asset—both of which can normally be handled through a small estate proceeding. To handle the stray asset, I also provide the client with a simple will (*not* a pour-over will, for fear that inappropriate assets could end up in the trust).

The trust's simplicity (two pages, including signature lines) allows me to charge my clients about double, instead

of triple, what I charge for a simple will. My fee also includes drafting and recording the quit-claim deed. Its simplicity is also good because the unsophisticated client—

the type of client normally served by this trust—can understand it.

The house trust isn't foolproof, of course. Most notably, there is the trouble of dealing with the house's taxes, insurance, and maintenance. Because the trust has no other assets, the trustee has no assets to pay these expenses. I, consequently, add the following language to the client's durable power of attorney: "My attorney-in-fact shall have the power to expend any sums that he or she deems necessary to maintain my principal residence—including to pay insurance premiums, taxes, and maintenance costs—notwithstanding that my residence has been placed in trust, and my attorney-in-fact is directed to do so, unless he or she, in his or her reasonable discretion, determines that such expen-

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ditures would be imprudent under the then-current circumstances."

The house trust contemplates a family member or friend acting as successor trustee, instead of a bank. Not only is a bank unnecessary for such a small job, but this allows me to use an abbreviated powers and duties provision by merely incorporating EPIC's provisions.

The house trust is reproduced at the end of this article for your reference. You can add bells and whistles as you deem fit, but I've stayed away from them to keep the trust as simple and short as possible. The trust, for instance, could easily be adapted for use by a married couple, but the second-to-die and co-trustee language would lengthen and complicate it.

My clients have been pleased with the house trust. They understand it and they're happy with my fees. I'm hoping this article will make it available to more retirees who never accumulated a lot of money but deserve our thoughtful attention. Overall, we'll make less money—in reduced drafting fees now and in lost probate fees down the road—but that's not as important as giving all our clients peace of mind at an affordable price. ♦

Eric Scheske will e-mail the trust to anyone who requests it electronically. You can e-mail him at bsbs@voyager.net. He also welcomes constructive criticism. Scheske is a shareholder in the law firm of Bird, Svendsen, Brothers, Scheske & Pattison, P.C. in Sturgis; president of the St. Joseph County Bar Association; and a professional freelance writer whose articles have appeared in magazines and journals throughout the United States and Canada.

HOUSE TRUST

I, John Doe, make this Declaration of Trust (“Declaration”) and declare as follows:

1. The Trustee shall hold the assets delivered to it in accordance with the terms of this Declaration.

2. As long as I am alive and competent, I shall have the right to (i) amend or revoke this Declaration, (ii) withdraw any asset from the trust created by this Declaration (the “Trust”), and (iii) change or remove Trustees.

3. The Trust may only hold the real estate described on Exhibit A, which contains a description of my residential real estate and real estate contiguous to my residence. No other assets may be added to the Trust, whether by gift or testamentary transfer from myself or others.

4. I shall serve as the initial Trustee. Upon my death, incapacity or resignation, my son, Joseph Doe, shall serve as Trustee until his death, incapacity or resignation, at which time my daughter, Judith Doe, shall serve as Trustee. No person shall serve as successor Trustee until agreeing, in writing, to be bound by the terms of this Declaration.

5. Any income generated by the Trust assets shall be distributed to me no less than quarter-annually, unless I am mentally incapacitated, in which case it shall be paid over for my support and welfare in a manner the Trustee, in his or her discretion, deems appropriate.

6. As soon as practicable following my death, the Trust assets shall be distributed in equal shares to my children: Joseph Doe and Judith Doe. The distribution, at the sole discretion of the Trustee, may be made by selling the real estate and distributing the net proceeds to my children or by conveying the real estate to my children as tenants in common. If a child predeceases me, then his or her share shall be distributed to his or her living children equally. If my deceased child leaves no children, then his or her share shall be distributed to my remaining children equally. Any distributions shall be made *per stirpes*. If any beneficiary is under the age of twenty-one when he or she is due to receive a distribution, his or her share shall be distributed to him or her pursuant to the Uniform Gifts to Minors Act or Uni-

form Transfers to Minors Act, either in Michigan or in the state of the beneficiary’s residence, as the Trustee may deem appropriate. If the applicable act gives the Trustee the ability to delay the effective date of the gift or transfer, the Trustee shall delay the effective date as long as possible, but not past age 25. If I leave no children or other issue, then the Trust estate shall be distributed to my heirs at law.

7. Neither the principal nor the income of the Trust shall be liable for the debts of a beneficiary, and no beneficiary shall have the power to sell, assign, transfer, encumber, hypothecate, dispose of, or anticipate his or her interest in the Trust assets.

8. The Trustee shall have all the powers conferred by Article VII of the Michigan Estates and Protected Individuals Code, unless the power is expressly excluded by the terms of this Declaration. In no event may a Trustee sell or encumber any real estate without my written consent; provided, however, that this provision shall not apply if a court has declared me mentally incapacitated or two licensed physicians have declared, in writing, that I am in a state that renders me mentally incapable of making my own decisions and that it is unlikely that I will recover my mental capacity.

9. The Trustee shall have the duties imposed by Article VII of the Michigan Estates and Protected Individuals Code, unless (i) expressly modified by the terms of this Declaration, or (ii) the duty cannot be performed due to the limited nature of the Trust (i.e., a trust that only holds my residential real estate).

10. The term “incapacitated” shall mean a mental incapacity that makes me an “incapacitated individual” under Section 1105 of the Michigan Estates and Protected Individuals Code.

11. The Trustee shall receive no compensation for acting as Trustee.

12. Anything in this Agreement to the contrary notwithstanding, the Trust shall terminate not later than twenty-one (21) years after my death and the Trust assets shall be distributed accordingly.

I have executed this Declaration of Trust on the date written below opposite my name.